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IN THE

Supreme Court of The United States

OCTOBER TERM, 1964

No. 1066

THE POSTER EXCHANGE, INC.,
Petitioner,

versus

PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITATIONS TO OPINIONS BELOW

Petitioner refers to the opinion of the District Court, dated July 2, 1963 (R. 90) as unreported and reproduces a copy as Appendix A to its petition. This opinion is reported in 35 F.R.D. 558.

THE QUESTIONS PRESENTED

The question involved is not, as petitioner prefers to assert, i.e., whether petitioner is bound by a judgment entered in another court in a suit by a different plaintiff, but whether, as found by the District Court and affirmed by the Circuit Court, there has been

no showing by petitioner on respondents' Motion for Summary Judgment that there is a genuine issue of fact for determination involving respondents.

At no point in this case have respondents contended that the doctrine of *res judicata* applies. The District Court, as it was entitled to do, held that other cases predicated on the same evidence as petitioner stated it planned to offer in this case, were entitled to great weight.

This Court on three separate occasions had denied applications for certiorari in such cases. *Lawlor v. National Screen Service Corporation*, 270 F. 2d 146 (3rd Cir. 1959), cert. den. 362 U.S. 922 (1960); *Vogelstein v. National Screen Service Corporation*, 204 F. Supp. 591 (D.C. Pa. 1962), aff'd 310 F. 2d 738 (3rd Cir. 1962), cert. den. 374 U.S. 840; *Lipp v. National Screen Service Corporation*, 270 F. 2d 146 (3rd Cir. 1959), cert. den. 362 U.S. 922 (1960).

COUNTER-STATEMENT OF THE CASE

The statement made by petitioner is deficient and incorrect in several important respects. The decision of the District Court cannot be understood except in the light of what the District Court had before it when it granted the Motion for Summary Judgment.

The original complaint was filed on July 17, 1961, in which petitioner (plaintiff) named only National Screen Service Corporation (National Screen) as a defendant, charging it with the maintenance of an illegal monopoly in respect of the production and distribution of standard motion picture advertising accessories, and

its refusal subsequent to May 16, 1961 to deal with plaintiff (R. 1).

The District Court granted a temporary restraining order and denied a summary judgment in favor of National Screen. (*Poster Exchange, Inc. v. National Screen Service Corporation,* 198 F. Supp. 557, D.C.N.D. Ga. 1961). On appeal, the Circuit Court affirmed (*National Screen Service Corporation v. Poster Exchange, Inc.,* 305 F. 2d 647, 5th Cir., July 11, 1962).

On the eve of trial, counsel for plaintiff withdrew and were immediately succeeded by Francis T. Anderson, Esquire, of Philadelphia, who has represented plaintiff poster-renters in anti-trust suits against National Screen and motion picture distributors, over a period of years, all of which have been determined in favor of National Screen and the motion picture distributors and in which the same questions here involved were determined adversely to the contentions made by Mr. Anderson on behalf of this plaintiff (see pages 15-19 of this brief).

On March 12, 1963, plaintiff filed an amended complaint (R. 35) naming as additional defendants Paramount Film Distributing Corporation, Metro-Goldwyn-Mayer, Inc., Twentieth Century-Fox Film Corporation, United Artists Corporation and Warner Bros. Pictures Distributing Corporation, all motion picture distributors, the respondents herein but referred to as the motion picture distributors or distributor defendants. These distributor defendants were charged with conspiracy with National Screen to create an illegal monopoly through the use of exclusive contracts giving National Screen the sole right to distribute advertising

accessories as to pictures distributed by the distributor defendants (Par. 8, R. 38-39).

The District Court dissolved the preliminary restraining order previously granted (R. 33) when it permitted the amended complaint to be filed.

Thus it was only after the passage of almost two years that plaintiff sought to involve in the controversy between itself and National Screen the distributor defendants, none of which is engaged in the manufacture or distribution of advertising accessories, and at the cost of the restraining order granted to plaintiff.

The distributor defendants in their answers denied the allegation as to conspiracy. The substance of the defense of each distributor defendant is contained in the "Third Defense" of Metro-Goldwyn-Mayer, Inc. (R. 70) as follows:

> "This defendant is engaged in the distribution of motion pictures. Exhibitors who license such pictures use from time to time what is known in the trade as motion picture accessories to advertise said pictures. For many years, this defendant manufactured and distributed such motion picture accessories. Sometime prior to 1947 it licensed the defendant National Screen Service Corporation exclusively to manufacture and distribute accessories to exhibitors desiring them. In 1952 the said license was made non-exclusive. This defendant's only concern is that proper motion picture accessories may be made available

> to exhibitors who license pictures distributed by it. This defendant has not participated with any of the other defendants for the purpose of creating a monopoly in the defendant National Screen Service Corporation. National Screen Service Corporation is the only party which has sought a license from this defendant to manufacture and distribute advertising accessories."

Based on plaintiff's answers to interrogatories and admissions of officers of plaintiff and cases in which similar questions had been decided adversely to the contentions of plaintiff, the distributor defendants moved for summary judgment (R. 81) on the ground:

> "The above shows that plaintiff has no facts to support its charge that movants, the motion picture producers and distributors named as defendants in this case, conspired with the defendant National Screen Service Corporation, or with each other, for the purpose of creating in National Screen Service Corporation a monopoly in the distribution of motion picture advertising accessories, in violation of the Sherman Act."

Interrogatories

The distributor defendants sought by discovery interrogatories (R. 71) to obtain the facts on which plaintiff based its claim that they, or any of them, were parties to a conspiracy with National Screen to monopolize the business of distributing standard advertising

accessories on a national scale, and also names of persons having knowledge of such facts.

Plaintiff answered (R. 78) that relations prior to 1957 continued after 1957, that even though plaintiff knew that licenses became non-exclusive, plaintiff decided against applying for a license (R. 86).

Thus plaintiff failed to submit a single fact to support its conspiracy claim. It merely stated its contention that even though the licenses had been changed from exclusive to non-exclusive, this had no effect.

Admissions of W. H. Cobb

A similar suit had been brought in New Orleans in 1961 by *Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation* and the distributor defendants (E.D. La. No. 11,145, 1961) and in the deposition of W. H. Cobb, stockholder and officer of this plaintiff, taken on May 31, 1961 and also at a hearing on a motion for interlocutory judgment (R. 83-84), when asked if he knew of any facts indicating a conspiracy between the producer (distributor) defendants and National Screen, he replied that he did not.

Deposition of M. J. Rogers

Mr. Rogers testified by deposition in this case August 11, 1961 before the filing of the amended complaint that he was president and manager of plaintiff but the stockholders were W. H. Cobb of New Orleans, L. C. Montgomery of New Orleans and the John T. Ezell, Sr. Estate; that W. H. Cobb has been secretary and treasurer since the corporation was formed; that he Rog-

ers, fixed the policies to be followed with the concurrence of the stockholders; that at no times was any license sought of any motion picture producer to manufacture and distribute standard accessories although it was discussed with the stockholders (R. 86); that W. H. Cobb was interested not only in the New Orleans and Atlanta poster exchanges but one in Memphis as well (R. 84-85).

Admissions of Plaintiff's Attorney in Open Court

In addition to the above, the District Court had the admission of plaintiff's attorney in open court on which to base its grant of the motion. This is referred to in the District Court's opinion (R. 93, Appendix A to petition for certiorari, p. 24).

> "Mr. Anderson, the attorney for the plaintiff, The Poster Exchange, Inc., admitted, in open court, recently when the Court heard arguments on this motion for summary judgment that he was relying on the same evidence in this case in an attempt to establish conspiracy as he was relying upon in the *Lawlor* case. Inasmuch as there is sound judicial authority denying the introduction and involvement of these movants in a conspiracy trial, this Court is persuaded and inclined to accept that determination as final. Repeated and protracted litigation involving the same questions and issues previously tried will serve no useful purpose as there must eventually be an end to litigation."

Plaintiff made no showing by affidavit or otherwise of any factual issue existing on its charge of conspiracy.

The District Court found that as plaintiff had no evidence of conspiracy in respect of the distributor defendants other than that previously determined to be insufficient as a matter of law, the motion should be granted. The previous determination had been in the *Lawlor* case supra, 270 F. 2d 146, 148 (3rd Cir. 1959), where the Court of Appeals noted, in affirming, that "In effect the trial court held that plaintiffs had failed to sustain their burden of proof." On the conspiracy issue, the Court of Appeals specifically noted, 270 F. 2d 146, 154, ". . . the plaintiffs here failed in their proof of an 'arrangement,' 'plan,' or 'scheme'." As a matter of law, then, the same evidence here could have only that insufficient effect as proof of conspiracy.

The District Court in denying plaintiff's motion for reconsideration (R. 96, Appendix B to petition for certiorari, p. 26), further stated the court's reasons for granting it (R. 97, Appendix B, pp. 26-27), emphasizing that no showing had been made by plaintiff that there was any issue of fact for determination, and concluding:

> "When sufficient credible evidence has not been submitted, then the remedy of summary judgment performs the necessary function to avoid burdening the courts with worthless litigation."

Factual Background

Plaintiff has been engaged in the business of renting to motion picture exhibitors advertising material such as posters, purchased from National Screen and distributors of motion pictures who handle directly advertising material such, for example, as Columbia

Pictures Corporation and Universal Film Exchange, Inc. The situation is outlined in the opinion of the Circuit Court in the first appeal (305 F. 2d 647) at pages 649-650:

> "Poster Exchange is a poster-renter or 'jobber' engaged in the business of selling or renting to motion picture theatres standard motion picture advertising accessories, such as posters and stills for theatre billboards and lobbies. National has for many years been engaged in the business of manufacturing and distributing such motion picture advertising accessories directly to motion picture theatres as well as to poster-renter jobbers such as Poster Exchange. This resulted in National competing with its 'jobbers' for the motion picture theatre's advertising business. Poster Exchange has obtained accessories from National since the year 1947 in substantial quantities. The market area involved embraces cities in the state of Alabama, Georgia, Florida and Tennessee. National also supplies exhibitors in the same area and both are engaged in interstate commerce. There is no contractual relationship between the parties.
>
> "National notified Poster Exchange on February 15, 1961, that from and after May 16, 1961, National would no longer make accessories available to poster-renter 'jobbers' such as Poster Exchange, but would restrict its business to dealing solely and directly with motion picture theatres, often referred to as exhibitors.

"Prior to 1952, National Screen had an exclusive license from the motion picture companies to manufacture and distribute motion picture advertising accessories. There is some dispute as to whether the license was exclusive between 1952 and 1957 or non-exclusive, but in 1957 National Screen entered into a 'Consent Decree' with the government in a case then pending in the United States District Court, Southern District of New York, styled United States of America v. National Screen Service Corp., et al.

"The crux of this 'Consent Decree' was to give Poster Exchange (and others) the qualified right to obtain its own license to manufacture and distribute its own accessories and to compete with National in the market.

"Poster Exchange is not presently, nor has it ever been, in the business of manufacturing motion picture accessories.

The background of these poster-renter cases was reviewed in great detail in the *Lawlor* case (270 F. 2d 146) and the District Court's reference thereto is adequate (R. 91, Appendix A, p. 23).

"That opinion states that, commencing around 1939, the motion picture distributors severally determined that it was uneconomic to produce and distribute their own accessories. For that reason, each entered into a separate agreement with National Screen for that purpose. In so doing, each acted individually and

without reference to the others. The Court stated, in respect to the relationship between the motion picture producers and National Screen:

> " '. . . They [the distributors] contracted with National Screen because no comparable firm was available to undertake the task. The most that can be gleaned from the factual pattern is that the business climate affected each of the film companies in a substantially similar way and they individually decided to extricate themselves from a losing proposition.' "

There is no dispute as to the fact that these distributor defendants entered into contracts with National Screen for the latter to manufacture and distribute advertising accessories concerning motion pictures distributed by the distributor defendants, and that at first such contracts were exclusive but later non-exclusive, this at different times but some years ago. There is also no dispute that plaintiff has never sought a license to manufacture and distribute such accessories from any of the distributor defendants, as authorized by the consent decree. On these facts and others in the record the Circuit Court had no choice but to affirm the decision of the District Court.

In petitioner's statement it is said that the respondents are five major motion picture distributors who produce the accessories that petitioner National Screen distributes. This is incorrect. Production of such accessories is by National Screen. Furthermore, no reference is made by petitioner to the grounds of the Motion for Summary Judgment, plaintiff's answer to the inter-

rogatories, the admissions of plaintiff's officers, a companion case in New Orleans or the admission of plaintiff's attorney in open court. No reference is made to the requirements of Rule 56 (e) of the Federal Rules of Civil Procedure and particularly the amendment adopted by this Court on January 1, 1963 that on motion for summary judgment an adverse party may not rest upon the mere allegations or denials of his pleadings but must set forth by affidavits or otherwise specific facts showing that there is a genuine issue for trial.

ARGUMENT

I.

PETITIONER SPECIFIED NO FACTS INDICATIVE OF A CONSPIRACY AMONG THE DISTRIBUTOR DEFENDANTS AND NATIONAL SCREEN AND HENCE DID NOT MEET THE BURDEN IMPOSED ON IT UNDER RULE 56(e)

Respondents, brought into the case some twenty months after it was filed, sought to ascertain from the plaintiff the facts on which plaintiff in its amended complaint based its claim of conspiracy. In answer to interrogatories seeking such facts, plaintiff was able to suggest none at all.

There was the admission of an officer and stockholder of the plaintiff in the companion case brought in New Orleans that he knew of no facts to support a similar charge of conspiracy. Plaintiff's manager, on deposition in this case, admitted that plaintiff had made no application to any distributor defendant for a license to make and distribute advertising accessories.

There were the decisions in other courts involving the same issue of conspiracy in which the present counsel for petitioner had participated wherein the issue had been decided contrary to plaintiff's contention.

Accordingly, the distributor defendants moved for summary judgment on the ground that no factual issue as to conspiracy was presented. To this motion plaintiff made no showing by affidavit or otherwise that any such factual issue existed so as to justify a long and tedious trial on the merits, but relied on the allegations of the amended complaint.

Plaintiff's duty under the circumstances is spelled out in the amendment to Rule 56(e) adopted by this Court on January 21, 1963 to prevent a party against whom such a motion is filed from relying on his pleadings, the amendment reading as follows:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Even before this amendment was enacted, the same rule was applied in all of the circuits with the possible exception of the Third Circuit. The Fifth Circuit in *Chambers and Company v. Equitable Life Assurance Society*, 224 F. 2d 338, 346 (5th Cir. 1955) held:

> "It was not permissible that Appellant hold back any evidence or fail to make a full disclosure of the facts upon which it relied for recovery. Disclosure under summary judgment must be full and complete."

The Second Circuit in *Dressler v. M. V. Sandpiper*, 331 F. 2d 130 (2nd Cir. 1964), discussed the above amendment as having been adopted to meet the decisions of the Third Circuit, saying the Rule was specifically amended to provide that:

> "When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleadings but his response, by affidavits or as otherwise provided by this Rule, must set forth specific facts showing that there is a genuine issue for trial."

In *Norton v. McShane*, 332 F. 2d 855, 861 (5th Cir. 1964) the court had this to say with reference to another situation in which the plaintiffs were relying exclusively on allegations in their complaint:

> "In the face of the Attorney General's affidavit, the plaintiffs cannot rest upon the mere allegations of their complaints unsupported by sworn testimony. It became incumbent on the plaintiffs, by affidavits or otherwise as provided in Rule 56, supra, to set forth specific facts showing that there was a genuine issue for trial as to whether the defendants were acting within the line and scope of their official duties. See Cunningham v. Securities In-

vestment Company, 5 Cir. 1960, 278 F. 2d 600, 602, 603. The plaintiffs introduced no evidence whatever, and thus failed completely to meet the burden resting upon them."

At the hearing on the Motion for Summary Judgment plaintiff's attorney, in response to a question from the District Court, admitted he was relying on the same evidence in this case to establish conspiracy as he had relied on unsuccessfully in the *Lawlor* case (R. 93, Appendix A to petition for certiorari, p. 24).

Petitioner not only failed to offer any facts to justify a trial on the issue of conspiracy but evaded any attempt to argue it had complied with Rule 56 (e) when the review of the District Court's decision was had in the Circuit Court and it has also ignored this question in its petition for certiorari.

II.

THE DISTRICT COURT WAS AUTHORIZED TO GIVE GREAT WEIGHT TO THE PREVIOUS CASES IN WHICH THE SAME CHARGE WAS MADE

In reaching its decision the District Court had the benefit of the following cases in which the charge had been made that the distributor defendants conspired with National Screen:

Lawlor v. National Screen Service Corp., 270 F. 2d 146 (3rd Cir. 1959, cert. den. 362 U. S. 922, 1960)

Vogelstein v. National Screen Service Corp., 204 F. Supp. 591 (D.C.E.D. Pa. 1962), aff'd 310 F. 2d 738 (3rd Cir. 1962), cert. den. 374 U.S. 840

Exhibitors Poster Exchange, Inc. v. National Screen Service Corp. (C.A. No. 11, 145 U.S.D.C. E.D. La).

In the *Lawlor* case the issue of conspiracy, as well as that of monopoly, were both tried at length before the District Court without a jury. The District Court entered findings of fact and conclusions of law which are contained in the Supplemental Record. The District Court found in conclusions of law Nos. 3 and 4 (Supp. R. 67):

> "3. The defendant, National Screen, did not monopolize or attempt to monopolize within the meaning of Section 3 of the Sherman Act.
>
> "4. No defendant herein combined or conspired with any other defendant or defendants within the meaning of Section 1 of the Sherman Act."

Petitioner would have this Court believe that notwithstanding these conclusions, there was no determination in the *Lawlor* case that conspiracy had not been shown. When, however, the District Court judgment was affirmed on appeal by the Third Circuit, the Court of Appeals reviewed the background and concluded that there was no showing of anything illegal in the separate decisions by the distributor defendants to enter into contracts with National Screen for the latter to manufacture and distribute advertising acces-

sories on the pictures which they distributed. (270 F. 2d 146, 155) It was duly noted that plaintiff had never sought from any of the distributor defendants licenses under which they themselves would manufacture accessories and in fact it was expressly stated that they did not desire such licenses (270 F. 2d 146, 154).

This Court refused to grant a writ of certiorari.

In the *Vogelstein* case, the motion for summary judgment of the defendants was granted. It will be obvious from the following part of the District Court's opinion in that case that the same contention was there made as is here made by counsel for petitioner:

> "It is true that the judgment in favor of defendants in Lawlor is supported not only by the findings that there was no unlawful monopoly or conspiracy, but on other findings as well, e.g., the Court found that plaintiffs in Lawlor had failed to show any harm. Those other findings in no way lessen the effect of the findings on the monopoly and conspiracy issues. The resolution of those issues depended not upon findings based on the circumstances of any one dealer, but instead involved the nationwide development and practices of an industry. Either defendants had conspired to monopolize the poster business or they hadn't; either defendants monopolized the poster business or they didn't. The determination of these issues was not, as we regard it, dependent upon circumstances peculiar to Lawlor, Vogelstein or any other poster-dealer." (204 F. Supp. 591, 596).

In the New Orleans case, brought at about the same time as this one, a motion for summary judgment on behalf of the distributor defendants was made and granted. Judge Herbert W. Christenberry's Orders dated July 26, 1961 are unreported but the court stated it found no genuine issue of fact had been submitted to the trial court and that the motion picture distributors were entitled to judgment as a matter of law.

Of interest is the decision of *Simmons v. Union News Company,* 341 F. 2d 531, 533 (6th Cir. 1965), where the court held the doctrine of *stare decisis* to be applicable where the plaintiff was not a party to a prior case, the court stating at page 533:

> "We agree with appellant that the judgment in the Hildreth case is not res judicata of the claim in the present case. The present plaintiff was not a party to that litigation. United States v. Pink, 315 U.S. 203, 216; Lawlor v. National Screen Service Corp., 349 U.S. 322, 329, dismissed under Rule 60, 359 U.S. 951. But the doctrine of stare decisis is applicable. Cold Metal Process Co. v. E. W. Bliss Co., 285 F.2d 231, 236, C.A 6th, cert. denied, 366 U.S. 911."

Petitioner urges that the findings in *Lawlor* are ineffectual insofar as absolving the licensors on the charge of conspiracy and cites *Interstate Circuit v. United States,* 306 U. S. 208. There is little, if any, resemblance between the facts found in the two cases. The *Interstate* decision by this Court was predicated on the conclusion that each defendant knowingly accepted an invitation to join in the plan proposed, that unanimous action was required for success, that it offered

an opportunity for increased profits and that failure to participate offered the risk of substantial losses (302 U. S. 222, 223, 225, 226). The finding in *Lawlor* quoted by petitioner on page 12 of its brief completely refutes any knowledge or consultation with others by the defendant Paramount:

> "The decision did not depend upon the action of any other company with respect to a similar contract or arrangement. The decision was based upon the business interests of Paramount Pictures, Inc."

Petitioner notes that substantially the same finding was made with respect to the other seven licensors.

The District Court was entitled to give great weight to the prior cases in which efforts to prove a conspiracy with National Screen had been unsuccessful, in the light of the admission of plaintiff's counsel that he was relying on the same evidence as was offered in *Lawlor* and plaintiff's failure to offer any facts to justify another trial on the same issue.

III.

PLAINTIFF WAS PRECLUDED FROM RECOVERY BECAUSE IT NEVER SOUGHT A LICENSE FROM ANY OF THE DISTRIBUTOR DEFENDANTS

Though plaintiff complains of the license agreements made individually by the distributor defendants with National Screen to manufacture and distribute accessories and the refusal of National Screen to supply plaintiff, plaintiff has never sought such a license from

any of the distributor defendants. This was admitted by M. J. Rogers, plaintiff's president and managing officer in Atlanta, on his deposition (R. 86-88).

Before a private anti-trust plaintiff may recover, it must have demanded that which it claims to have lost because of the alleged illegal acts. *(Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F. 2d 561 (7th Cir. 1951), cert. den. 342 U. S. 909, 1952; *Royster Drive-In Theatres v. American Broadcasting-Paramount*, 268 F. 2d 246, 251 (2nd Cir. 1959), cert. den. 361 U. S. 835; *Paramount Film Distributing Corp. v. Appelbaum*, 217 F. 2d 101, 127 (5th Cir. 1954); *Brown v. Western Massachusetts Theatres*, 288 F. 2d 302, 305 (1st Cir. 1961); *Columbia Pictures Corp. v. Charles Rubinstein, Inc.*, 289 F. 2d 418, 421 (8th Cir. 1961). In *Lawlor*, supra, the Third Circuit said as to plaintiff's failure there to seek licenses from the motion picture distributors (270 F. 2d 146, 155):

> "Plaintiffs have never attempted to obtain from any of the film companies licenses under which they themselves would manufacture accessories and, in fact, have expressly stated that they do not desire such licenses. In the absence of such demand upon the part of plaintiffs, the courts have consistently held that there can be no recovery in an anti-trust action."

Petitioner also takes exception to the terms of the consent decree entered in *United States v. National Screen Service Corporation, et al*, D.C.S.D. N.Y. C.A. No 75,138, CCH Trade Cases §68,670, which set up certain ground rules to be followed by the motion picture

distributors in connection with the granting of licenses to manufacture and distribute accessories.[1] But plaintiff's manager admitted it never even sought such a license.

Faced with the situation that plaintiff offered no evidence to indicate a conspiracy between the distributor

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[1]The pertinent provisions of the decree are Sections V(A) and V(B) (1):

> "(A) Subject to the other provisions in this Section V, each Producer Defendant is ordered and directed to grant to any qualified person applying therefor a license (including a license under the Producer Defendant's copyrights) to produce and distribute any type of trailers or to produce and distribute accessories relating to motion pictures released by the Producer Defendant, so long as and to the extent that the Producer Defendant or its distributor (as provided for below) licenses or otherwise authorizes any other person [other than an affiliate as described in Section II(C) hereof] to produce and distribute the trailers or the accessories sought to be produced and distributed by the person applying for the license; Provided, however, that any such license so granted may require reasonable terms and conditions (including payment of a reasonable royalty) agreed to by the Producer Defendant. In the event a Producer Defendant turns over distribution of its motion pictures to a non-affiliated distributor not a defendant herein, such Producer Defendant must either itself license pursuant to this Subsection (A) or require such distributor so to do.
> (B) No Producer Defendant shall be required to regard any person as a qualified applicant within the meaning of Subsection (A) unless:
>
> (1) The applicant can meet and will agree to meet reasonable business standards as to reliability, financial responsibility, ability, production facilities *and a national distribution organization* and facilities to service, with respect to all feature motion pictures released by the Producer Defendant, all exhibitors desiring such service. Provided, however, that the size of the organization and facilities of National Screen shall not be used as the standards of determining the adequacy of the applicant's qualifications." [Emphasis supplied]

defendants and National Screen, and the decisions in other jurisdictions involving the same license agreements relied upon by the plaintiff, the District Court had no choice but to hold that the motion for summary judgment should be granted and the distributor defendants not be put to long and expensive litigation on a retrial of questions already determined. As the District Court had given careful consideration to the question and entered opinions both on the motion and on rehearing, the *per curiam* opinion of affirmance by the Circuit Court was proper.

Thus plaintiff is clearly precluded from a recovery in the instant case because of its failure to seek a license from any of the distributor defendants.

CONCLUSION

Petitioner has shown no justification for the granting of the requested writ of certiorari. There is no conflict between decisions of any courts to be resolved. The decision in question is a proper application of Rule 56(e). What petitioner is complaining of is its own failure to meet the requirements of said Rule and to justify the holding of a long and tedious trial on the question of conspiracy. On the showing made, the motion for summary judgment was properly granted. As the District Court said (R. 98, Appendix B petition for certiorari, pp. 26-27):

> "When sufficient credible evidence has not been submitted, then the remedy of summary judgment performs the necessary function to

avoid burdening the courts with worthless litigation."

Respectfully submitted,

_____

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_____

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CERTIFICATE OF SERVICE

I, ROBERT S. SAMS, of counsel for respondents, do hereby certify that I have served a copy of the foregoing Response to the Petition for Certiorari on petitioner's counsel by depositing same in the United States mail, with Air Mail postage prepaid addressed to petitioner's counsel of record at his post office address.

This ____ day of May, 1965.

_____